No. 3015

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

United States of America,
Appellee,
vs.
Charles K. Holsman, et al.,
Appellants.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF THIS CASE.

This is an appeal by the defendants Charles K. Holsman and Gideon M. Freeman from a judgment and verdict of conviction, the prosecution being instituted under section 37 of the United States Penal Code, the charge being a conspiracy to violate section 215 of the United States Penal Code, that is, a conspiracy to devise a scheme or artifice to defraud various persons who are alleged to be unknown to the grand jurors; and not one witness was offered during the trial to show that one single person was defrauded, but the prosecution relied upon, and a conviction was

obtained, wholly upon decoy letters prepared and sent by the postoffice inspectors to the defendants, and the defendants' answer given thereto.

It is substantially charged in the indictment, page 6 of the transcript, that the defendants, who were physicians, conceived the idea of defrauding various persons by having persons fill out symptom blanks prepared by the defendants, describing their symptoms, and by representing to the persons so filling out symptom blanks that they could cure certain diseases by diagnosing their cases on the symptom blank.

Briefly stated, the evidence in this case shows that Dr. Charles K. Holsman and another person, who was not on trial, took a lease upon the offices in Los Angeles from which it is alleged, or claimed, the scheme was attempted to be carried out, and Dr. Gideon M. Freeman was in active charge of this office, and that certain decoy letters set out in the transcript were mailed by the postoffice inspectors from a postoffice in Arizona to the defendant Gideon M. Freeman in Los Angeles, making certain inquiries. and in response to these letters the said symptom blanks were sent to the fictitious person, and later on samples of so-called urine was sent from the same address to the defendant Freeman, and a reply purporting to come from his office to the decoy letter sent out through the mails. There was absolutely no evidence to sustain the charge in the indictment except the decoy letters and the replies thereto.

The errors assigned herein relate, generally speaking, first to the overruling of defendants' demurrer to

the indictment and second to the erroneous omission and exclusion of evidence and third to the erroneous instructions of the court and the failure of the court to give certain requested instructions on behalf of the defendants.

However immoral and illegal the acts of the defendants or other persons may have been under the circumstances, and however much prejudice may exist in the public mind against the charge of a professional man under the circumstances, we most respectfully invite very careful consideration to the record in this cause, confidently believing in the first place that fundamental principles of evidence intended for the safeguard of the defendants' rights have been violated; and that the instructions of the court are palpably contradictory and misleading, in one particular, at least; and that the failure to give certain requested instructions, denied to these defendants a fair and impartial trial.

THE ERRORS.

No. 1.

The Court Erred in Overruling Defendants' Demurrer to the Indictment.

The demurrer to the indictment in the case at bar should have been sustained for the principal reason that the indictment fails to allege (except by way of recital) the fraudulent intent of the defendants. The fraudulent intent is an essential element of the offense and it is not expressly alleged. Indeed, assuming all

the allegations of the indictment to be true, there is a possibility that the defendants acted in good faith. The indictment in this case is distinguished from the case of Van Gesner v. United States, 153 Fed. 47; Nickell v. United States, 161 Fed. 706, and United States v. Stevens, 44 Fed. 141, by the language used in the Gesner case at page 706, as follows:

"The whole scheme, as alleged, and proved to the satisfaction of the jury, shows beyond question that the false swearing contemplated by the conspiracy could not have been otherwise than wilful on the part of the instigated persons. When the facts alleged *necessarily import such wilfulness,* the failure to use the word itself is not fatal. Such failure, under such circumstances, would not be fatal even at common law."

In the case at bar one might infer that the statements of defendants when the symptoms showed health were falsely and fraudulently made with the design to deceive and defraud, but it is by *inference only,* and there is nothing to negative the honest belief of the defendants that notwithstanding such symptoms showed health, the patients needed treatment and encouragement. By an examination of the indictment, pages 6, 7, 8, 9 and 10 of the transcript, it will be seen that there are no positive allegations of the fraudulent intent, and that all the allegations relating thereto are by way of recital. This omission can not be supplied by intendment or implication, and the charge (fraudulent intent) must be made directly, and

not inferentially or by way of *recital.* United States v. Hess, 124 U. S. 485.

It does not matter how fraudulent any act or acts may appear by *implication,* or how repugnant to enlightened intelligence and morality it may appear by the general statement of the case, no person should be put upon trial upon issues not clearly alleged.

United States v. Post, 113 Fed. 853;
United States v. Long, 68 Fed. 348, and
People v. Albow, 35 N. E. Reporter 438.

No. 2.

The Court Erred in the Admission and Rejection of Evidence.

Under this assignment we respectfully call the court's attention to several alleged errors in the admission and rejection of evidence.

(a) On pages 73 and 74 of the Transcript it will be seen that Dr. Frank C. Fuller, a witness for the government, was called by the government and had testified very fully to the fact that he saw the defendant Dr. Holsman, in the summer of 1912, at the office of Dr. Freeman; and that he had charge of the office during Dr. Freeman's absence, and that he, Fuller, was an employee of the office; and on cross-examination it was attempted to be shown by the defendants what the equipment of the office consisted of, particularly as to the drug room and what it contained, and whether or not there was a static machine for the treatment of the diseases alleged to be attempted to be treated by the defendants, and who had

charge of doing the work and receiving and answering the letters, and the court would not permit this examination and denied the defendants the right to cross-examine the government witness, Fuller, upon these points. The witness Fuller was an employee of the defendants. He was, under the evidence, familiar with the office and its contents, also had knowledge of who received and answered the mail, and the essence of the charge being a fraudulent intent upon the part of the defendants to treat persons of diseases without the ability or facilities so to do, it was certainly proper on cross-examination to show by the government's own witness, who was familiar with the defendants' offices, the kind and character of the offices maintained by the defendants. It related to the same subject-matter inquired about by the prosecution, and denied to the defendants the right to cross-examine the government witness upon the matters inquired about in his chief examination. This error is particularly plain as to the defendant Holsman, as it was attempted by this particular witness to show that defendant Holsman was at and worked at the office, and counsel for defendant Holsman was denied the right to inquire of the witness as to who received the mail, etc., that is, as to whether or not the defendant Holsman received it or had anything to do with it, and as to what the very equipment was in the office which it is shown by the witness in his direct examination was used by Dr. Holsman. The evidence is as follows [Tr. pp. 73-4]:

"My name is Frank C. Fuller. I am a physician.

I know Doctors Holsman and Freeman. I first met Dr. Holsman some time in the summer of 1912 at 327½ South Spring street, and first met Dr. Freeman about a year prior to that. In 1912 I was employed at 327½ South Spring street. I think I began there about the third week of May, 1912, and worked until the next May, about the middle of the month. When I first went to work the office was situated at 305½ South Spring street, and shortly after May, 1912, the offices were removed to 327½ South Spring street, and Doctor Freeman was in this same office. Dr. Freeman left the offices at 327½ some time in April, 1913, and I was there about 30 days after he left. I saw Doctor Holsman at 327½ South Spring street for about three weeks, which I think was the latter part of July, 1912. I think he was at this address every day during these three weeks. He had charge of the office during Doctor Freeman's absence. He was not there more than once or twice after that to my knowledge, and this was at the latter part of the year 1912."

"Cross-Examination

of said Frank C. Fuller.

'I was employed at 327½ South Spring street to treat patients under the supervision of Doctor Freeman. I was working on a salary. While I was there Doctor Freeman was in charge of the office and Miss Wilhelm was the stenographer. Mr. Sims (one of the defendants herein) was the man in charge of the drugs and had charge of the moneys. I was in the office at said address for about a year and Doctor

Holsman was only there for about three weeks in the summer of 1912 and for a few days a little later in the year. I think Doctor Holsman did treat patients while he was there.' At this point it was attempted to be shown by the witness what the equipment of the office consisted of, particularly as to the drug room and what it contained, that is. the amount and extent of the drugs and the supply and how it was kept up; and as to whether or not there was a static machine there for the treatment of diseases; and who had charge of and did the work of receiving and answering letters. On objection of counsel for the government that said cross-examination was not competent cross-examination and incompetent, irrelevant and immaterial, the court sustained the objection to this line of cross-examination, to which the defendants and each of them excepted. Whereupon this witness was temporarily excused from the witness stand."

This was too narrow a view of the right of the defendants on the cross-examination.

Diggs v. United States, 220 Fed. R. 545;
Meyer v. United States, 220 Fed. R. 822;
Bassett v. Erickson Construction Co., 213 Fed. R. 810.

(b) It is respectfully submitted that the court seriously erred, as shown on pages 74, 75, 76, 77 and 78 of the Transcript herein, in the admission of government Exhibit No. 1A. The Transcript is as follows:

"By Mr. Moody, assistant U. S. attorney:

'If the court please, I desire to introduce into evi-

dence an affidavit which I hold in my hand, and which counsel has examined.

Mr. Stone: To this we object, and I make the objection on behalf of the defendant Holsman, as hearsay; and we object on behalf of the other defendant as incompetent, irrelevant and immaterial. It has no bearing on the issues whatever.

Mr. Moody: Does the court desire to examine the document and pass on it?

The Court: Well, Mr. Moody, I have an objection here as being incompetent. I don't see how you can introduce it unless you prove it was executed.

Mr. Stone: Your Honor got the objection as to the other defendant, that it was hearsay?

Mr. Moody: I don't think there is any dispute about the execution of it, is there?

Mr. Stone: Well, I don't know.

Mr. Moody: Well, if there is any dispute, I will remove the dispute. I presumed there would not be, in view of the signature that is on there. If there is any dispute I will call a witness to prove its execution.

Mr. Hupp: There is no dispute as to the signature.

The Court: What is that?

Mr. Hupp: There is no dispute as to the signatures.

Mr. Moody: No dispute as to the signatures.

The Court: Let me see it.

(The paper was handed to the court.)

The Court: The objection will be overruled.

Mr. Moody: Mark it as United States Exhibit Number 2. I desire that that be marked United States Exhibit 1-A, in order that the other exhibits may be

kept in the proper order, and save the clerk re-marking the entire number that we expect to be introduced.

Mr. Stone: Let the defendant Holsman have an exception to that ruling as to him, on the ground that it is hearsay as to him.

The Court: Yes, sir.

Mr. Hupp: And exception on the part of the defendant Freeman.

Mr. Moody (reading): "State of California, county of Los Angeles, ss"—

The Court: Just a moment, Mr. Moody.

Mr. Stone: That the record may show, in a conspiracy charge it would not be admissible as a declaration of one of the conspirators at this stage of the trial; and, secondly, it is hearsay pure and simple against the defendant Holsman.

The Court: What is the date of it?

Mr. Moody: September 11, 1911.

The Court: Well, Mr. Moody, it could only go in as a statement or declaration of one of the conspirators, after the formation of the conspiracy, and while it was existing.

Mr. Stone: If there was one.

The Court: And while it was existing. It seems to me like—

Mr. Hupp: You will notice, if the court please, if the court will permit me, on page 1 of the indictment it is alleged that the conspiracy was entered into in the year 1912, whereas this paper that they have offered was a year prior to that time, and therefore would be clearly inadmissible as being outside the issues and before the conspiracy was originated.

Mr. Palmer: Of course, Your Honor, the allegation of a date in an indictment is subject to the proof, and it is not a material allegation, provided that the date is before the time of the returning of the indictment. That is a well acknowledged principle of law. And the fact that this is alleged to have been in 1912, and that this evidence applies to 1911—we have already had a witness on the stand that shows that the very office that is alleged here was moved from the place that is stated in this affidavit, 305½ South Spring street, to the place that is mentioned in the indictment. So that it is connected, and connecting these people together at that time. And the fact that it is alleged the conspiracy was formed in 1912 cannot keep us from showing it, provided we show it was formed at a time before the returning of the indictment, and the overt act—

The Court: I don't think that the dates are very material in this thing, but then your statement here is—

Mr. Stone: If Your Honor will pardon me for making this additional statement, I understand the rule to be in a conspiracy charge that you cannot admit the statements of any one of the alleged conspirators against another alleged conspirator until the government has first proved *prima facie* a conspiracy.

The Court: Yes.

Mr. Stone: There is no doubt about that being the law. Now, my first objection, then, is to the fact that there is no evidence of a conspiracy so far in this trial. In the second place, that any affidavit would

be hearsay as to parties who did not make the affidavit. Now, Your Honor would not for a minute admit testimony if one of the defendants should have stated to somebody that certain people were practicing in an office on a certain date; that would be pure hearsay, whether it is in writing or verbal.

Mr. Palmer: This affidavit is a paper which is required to be made by law, and made by one of these defendants. It is a record of an office required to be made by law, and he has made this, so that it cannot possibly be hearsay so far as that defendant is concerned.

The Court: That is entirely so. There is no doubt about that. But the other defendant has got to be considered. He makes an objection to it.

Mr. Palmer: Now we have connected—

The Court: Now, what proof is here about their office at 305½ South Spring street?

Mr. Palmer: The testimony of Doctor Fuller, just on the stand. He testified that at the time of his employment in May, 1912, that the office was at 305½ South Spring street, and that afterwards, in about June or July of that year, it was removed to 327½.

The Court: All right. I didn't understand those numbers. I will overrule the objection.

Mr. Stone: To which the defendants, and each of them, if Your Honor please, except.

(Thereupon Mr. Moody read to the jury the paper so offered and received in evidence, the same being in the words and figures following, to-wit:)

'Plaintiff's Exhibit No. 1-A.

Affidavit.

State of California, County of Los Angeles—ss.

G. M. Freeman, being first duly sworn, deposes and says: I am a physician, duly licensed by the state board of medical examiners of the state of California, and am practicing medicine at number 305½ South Spring street, in the city of Los Angeles, county of Los Angeles, state of California, and that the following are the names of each and every person practicing or assisting in the practice of medicine and surgery in my said office, to-wit:

G. M. Freeman, duly licensed by the state board of medical examiners of California;

D. F. Callinan, duly licensed by said board of medical examiners;

H. E. Vreeland, duly licensed by said board of medical examiners;

C. K. Holsman, duly licensed by said board of medical examiners; and affiant further states that

H. W. Baskette, who resides in the city of Chicago, state of Illinois, and who is in the city of Los Angeles temporarily, and who is a duly registered and licensed physicia nunder the laws of the state of Illinois, has upon several occasions been called into consultation.

(Signed) G. M. Freeman.

Subscribed and sworn to before me this 8th day of September, 1911.

(Seal) (Signed) Geo. S. Hupp,

Notary Public in and for the County of Los Angeles, State of California.'

Filed Sept. 11, 1911. Board of Medical Examiners of the state of California. ..... secretary."

The prosecution offered in evidence this exhibit, more particularly shown on pages 78 and 79 of the Transcript ,and which was an *ex parte* affidavit of the defendant Freeman, sworn to before a notary public on September 8, 1911, and which, among other things, stated that the defendant Holsman was "practicing medicine and surgery" in his, Freeman's, office at said date. It will be noted that the lease on the premises in the name of defendant Holsman was dated May 22, 1912 [page 72 of the Transcript]. It is therefore respectfully submitted that the admission of this *ex parte* affidavit violated all elementary principles of law. First, it was hearsay as to the defendant Holsman, and second, it was a conclusion of the defendant Freeman, and even if admissible, was a statement of a conclusion, rather than of the facts showing what the defendant Holsman did at the office. Would it not be just as reasonable for some third person to have been placed upon the witness stand by the prosecution, and for the court to have permitted him, over defendant's objection, to have stated that the defendant Holsman was "practicing or assisting in the practice of medicine and surgery" in the office of the defendant Freeman on September 8, 1911? Was it not absolutely proper and essential that the facts showing just what Holsman did at this office be admitted to the jury, rather than an *ex parte* affidavit which it is not shown ever came to the attention of the defendant Holsman, and which states a conclusion pure and

simple? We respectfully urge this assignment of error for the additional reason that though the grand jurors, under an indictment drawn by the district attorney, charged that the defendants intended to defraud many persons, yet not one single person was ever produced at the trial of this action, as shown by the record, to show that he or she was defrauded. There is absolutely no evidence to susain the verdict except the decoy letters and the answers thereto. For this reason a plain violation of the elementary rules of evidence by the court should be considered. However, while it may not be necessary, as a matter of law, that any person was actually defrauded, yet why did not the postoffice inspectors, with their usual zeal and diligence, at least discover some person who was defrauded in their long investigation of this case? If it be contended by the prosecution that the admission of this *ex parte* affidavit was a statement of one coconspirator against another, our reply to that is was only by just such evidence that the defendant Holsman was connected with the case, and the weakness of the case against him was realized in thus attempting to bolster it up by hearsay evidence. But in the next place the fact that the affidavit was a statement of a conclusion and not a statement of facts cannot under any system of reasoning, or on any principle of ordinary simple justice, be held to be competent evidence to go to the jury. We respectfully submit that a citation of authority is unnecessary to sustain the views herein expressed on this assignment.

(c) In the next place it had been stipulated between

the defendants and the prosecution that two editions of the Los Angeles Examiner, containing the advertising of the defendant Freeman, should be admitted in evidence; and when these were offered in evidence under the stipulation [pages 80. 81, 82, 83, 84, 85, 86, 87, 88, 89 and 90 of the Transcript] the assistant United States attorney offered in evidence a bound volume of the copies of the Los Angeles Examiner for the months of July and August, 1912, consisting of the daily paper for those months [pages 80 and 81 of the Transcript]. The Transcript is as follows:

"Now, if thecourt pleases, I desire to offer in evidence, having been properly identified as having gone through the mails, and being a regular bound volume of the circulated copies of the Examiner for August and July, 1912, these papers, in so far as the same contain advertisements over the signature of Doctor Freeman, similar to the one introduced in evidence.

The Court: Any objection, gentlemen?

Mr. Stone: That is the one covered by the stipulation?

Mr. Moody: No, that is in. I am offering the others now for the months of July and August.

Mr. Stone: They are objected to as no foundation has been laid.

The Court: When you have shown one advertisemen, what is the importance of—

Mr. Moody: To show that that was not the only one; that is the idea, if the court please; that these advertisements were a matter of regular course, and there was not but one isolated advertisement placed in.

I have simply taken it during the time alleged in the indictment, the two bound volumes of the Examiner containing similar advertisements.

The Court: The objection will be overruled.

Mr. Stone: Does the record show our objection on the ground no foundation has been laid?

The Court: Well, the objection will be overruled.

Mr. Stone: Exception."

There was absolutely no foundation laid for these papers for July and August, 1912, purporting to contain certain advertisements of the defendant Freeman. There was not one line or word of testimony to the effect that said advertisements were placed in the paper by any of the defendants, or with their knowledge. Whereupon, at this stage of the trial the court, sitting in the cause, asked the assistant United States attorney in substance why was it necessary to show other advertisements when he *had shown* one advertisement, which question in and of itself, stated in the presence of the jury, assumed that one advertisement had been shown, and further assumed that the large bundle of papers for the months of July and August, 1912, also contained the advertisements of the defendant Freeman; in other words, that the advertisements appearing in them were authorized by the defendant Freeman. As shown on pages 80 and 81 of the Transcript, when the objection was made that no foundation was laid for the introduction of this large number of papers, the court overruled defendant's objection to the admission of all these purported advertisements.

It is inconceivable upon what principle of law a

series of advertisements running in a daily paper for a period of about two months might be admitted in evidence against the defendant without some slight foundation showing the authenticity of the advertisements. Was it not just as easy for them to have been identified, and the defendant's connection with them shown, if in truth they were printed under the authority of the defendants, or any of them? Were not the defendants and each of them entitled to the protection of this fundamental rule of evidence?

(d) In the next place, as shown on pages 90 and 91 of the Transcript, the court, over the objection and exception of the defendants, admitted in evidence the decoy letters without showing that they were received at the office of the defendant Freeman; and that certain replies purporting on their face to come from his office was received by the postoffice inspectors who had prepared the decoy letters. The Transcript is as follows:

"Thereupon it was stipulated between counsel for the government and counsel for the defendants that the letters referred to in said stipulation and to be afterwards introduced in evidence as the letters addressed to G. M. Freeman, Los Angeles, California, were each and all of them decoy letters, that is, that none of the letters introduced in evidence on the trial of this cause as having been written to the defendants or either of them were anything more than decoy letters prepared by postoffice inspectors, and that the replies thereto purported to come from the office of the defendant G. M. Freeman, at Los Angeles, and

the defendants objected to the said letters so written by said postoffice inspectors when the same were offered, upon the ground that the same were not competent in that there was no proof that the same were written by Dr. G. M. Freeman or that he authorized the same to be written and that said objections were overruled and that the defendants and each of them excepted."

While it is true, as the court instructed the jury, that it is not necessary to show in a case of this kind that the defendant directly authorized the mailing of a letter, if he put in operation the machinery which causes it to be mailed, yet in the case at bar we contend that the fact that a reply purported to come from the defendants' office is not sufficient evidence that he either directly or indirectly authorized it. This rule ought to be especially enforced in the case at bar, for the reason that, as heretofore sated, there is nothing whatever to sustain the verdict except the decoy letters and the purported replies to the decoy letters; but on the other hand the evidence shows that one Simms, who is also under indictment, must have been the person who mailed, or caused the letters to be mailed.

(c) It is next contended that the court abused its discretion in permitting the witness, Dr. Frank L. Cunningham, to testify as an expert regarding the treatment and diagnosis of gonorrhoea [pages 98 and 99 of the Transcript]. This witness was an osteopathic physician. He was permitted to testify that in his opinion certain diseases could not "be successfully

treated by mail." This was a general conclusion of the witness, not a statement of facts, when at the same time he was not competent to give testimony as an expert. He states hat he was not a medical physician. His whole testimony shows that he was called for the simple purpose of stating to the jury, over defendants' objection, that in his opinion the diseases spoken of could not be "successfully treated by mail." The Transcript is as follows:

"My name is Frank L. Cunningham. I am an osteopathic physician. Graduated here in Los Angeles in 1906. I have treated a few cases of gonorrhoea and am fairly familiar with them. I have not treated syphilis." Thereupon the following proceedings took place while the said witness was on the stand, after objection had theretofore been made to a similar question:

'Q. By Mr. Palmer: I will ask you, doctor, whether or not in your opinion, a physician can properly and successfully diagnose diseases of men, such as gonorrhoea and spermatorrhoea, by mail, without having seen the patient?

Mr. Stone: The same objection.

Mr. Hupp: To that we object upon the ground that the proper foundation has not been laid, and the witness has not qualified as an expert; that by his own testimony he belongs to a school that is not permitted under the law to administer medicines.

Q. By the Court: You say you have treated gonorrhoea?

A. I have, yes, sir.

Q. Have you treated spermatorrhoea?

A. I never have treated spermatorrhoea.

Q. Have you ever diagnosed such cases?

A. Yes, sir.

Q. You are familiar with the diagnosis of gonorrhoea?

A. Yes, sir.

The Court: I will overrule the objection.

Mr. Stone: Exception. Ex. 5."

It would probably have been as consistent for the prosecution to have called a carpenter, or a civil engineer. Upon matters requiring expert testimony of this serious nature it is respectfully submitted that the expert testimony should be confined to persons engaged in the treatment of such diseases.

(f) Also, as shown on page 101 of the Transcript, the court permitted the prosecution to ask a physician as to whether or not a patient could by an examination of the questions on the question blank alleged to be sent out by the defendant, tell whether or not he had one of these diseases. The Transcript is as follows:

"Thereupon the following proceedings occurred.

Q. Now, will you read the questions there, doctor, and tell the jury whether or not a patient can answer those questions and correctly tell whether or not he had clap or acute gonorrhoea?

Mr. Stone: That is objected to as incompetent, irrelevant and immaterial. It is shown by the doctor's testimony, Your Honor, on direct examination, that some patients could tell and some could not. Now, there is no way to tell, unless he had the patient before him and knew the character of the man.

Mr. Moody: I think Mr. Stone is in error.

The Court: That must depend upon his opinion about it, Mr. Stone. I will overrule your objection.

Mr. Stone: Exception. Ex. 6."

This over the objection of the defendants. The question and answer was certainly incompetent for the reason that it was an opinion of the physician as to the skill, learning, ability and competency of a person, or persons, to answer certain questions and draw certain conclusions therefrom, and which person or persons and their qualifications were wholly unknown to the physician. It was speculation pure and simple. It did not rise to the dignity required by the ordinary rules of evidence. In addition to all this, the question of the prosecution to the witness, Dr. Whitman, as shown on page 102 of the transcript, and a sample of which is as follows:

"Now, doctor, would you say from your experience in doctoring patients that it would be possible to successfully treat patients through the mails upon questions answered by them, without personal contact with the patient in the diseases, the so-called genito-urinary diseases?"

was indefinite and speculative, and therefore incompetent and not within the issues of the indictment. The indictment does not charge that the defendants could not in fact treat patients as claimed in the advertisements; it was no doubt intended to substantially charge in the indictment that the defendants did not in good faith intend to give the treatment which they advertised, and therefore the admission of this kind of

testimony was wholly beside the issues of the case, in addition to the other objectionable features.

(g) It is also contended that the court erred [see page 106 of the Transcript] in refusing the defendants the right to cross-examine postoffice inspector Webster as to the extent of his investigation, and as to whom he had talked to, or written in regard to the treatment received from the office of the defendants. It will be noted that in his direct testimony that he testified to having visited Dr. Freeman at his office, and asked him particularly regarding the signature to the purported answer to the decoy letter; also that Dr. Freeman told him about the nature of the business, and his connection with it, and the use of his name in the business, and the rubber stamp signature appearing on the purported reply to the decoy letter. Further that he received information as to the magnitude or the extent of the business of the defendants. Further that he had seen *bona fide* letters written from the office, and that he had them in his files.

Mr. Webster being an investigator for the prosecution, and having testified to so full an investigation, it was certainly proper for the defendants to be permitted to cross-examine him as to what he found in his investigation generally, whether by talking to people who had transacted business with the defendants, or otherwise, and the court, sustaining the prosecution's objections, stated that he did not think the conduct of the witness was material to the case. A witness's conduct in making an investigation about which he is to testify, is certainly always competent,

and this cross-examination was too narrowly restricted, and should have been received.

(h) Again, on page 109 of the Transcript it will be seen that the prosecution was permitted to ask Dr. Dakin in substance as to whether or not the diseases could or could not be successfully treated through the mails upon questions asked and answered by the patients. The Transcript is as follows:

"Now, basing your answer upon your experience in the treatment of these diseases, syphilis and gonorrhoea, would you say that these diseases could or could not be successfully treated through the mails upon questions asked by yourself and answered by the patients through the mails?

Mr. Stone: That is objected to as irrelevant, incompetent and immaterial, and not a proper subject of expert testimony.

The Court: The objection will be overruled.

Mr. Stone: Exception. Ex. 9."

This, we contend, was an improper question, and should not have been permitted, for the reason that it called for the conclusion of the witness as to the ability and understanding of persons whom he had never seen, and particularly a conclusion as to the ability of persons he did not know to answer certain questions; and in the next place, as heretofore urged, the indictment does not charge that the defendants were not able or capable of treating patients by asking and answering questions through the mails, and therefore the questions were without the issues and therefore incompetent for any purpose and highly prejudicial before the jury.

(i) In the next place, as shown on page 111 of the Transcript, it was attempted to be shown by the defendant Freeman while on the witness stand as to how his office was kept and how the equipment compared with other offices for the treatement of such diseases, and this objection was sustained by the court. The Transcript is as follows:

"Q. Compared with the average office, how was that office equipped for the treatment of those diseases?

Mr. Moody: I object to that as incompetent, irrelevant and immaterial and calling for a comparison with other offices.

The Court: Read the question.

(Question read.)

Mr. Moody: He stated what was in there. We object to the comparison.

The Court: Well, objection sustained."

Mr. Stone: To which the defendants, and each of them, except. Ex. 10."

It will be noted that the scheme charged was to defraud the people; that they would cure certain diseases in a certain way—then, was not the fact that they were fully equipped in the office for the treatment of such diseases by the use of a static machine and a supply of medicines, etc., competent as bearing on the question of their good faith in being in the business? We think this, on the ordinary principle of reasoning, is sound, and that the court erred in not permitting this examination.

(j) Finally, on the question of admission and rejection of evidence, the most serious error, as we contend, begins on page 113 of the Transcript, as follows (being the evidence of defendant Freeman):

"Q. Did you preserve and have you your correspondence for the year 1913?

A. I have, yes.

Mr. Stone: Do you want to examine this?

Mr. Moody: Is this correspondence of the office at Third and Broadway?

Mr. Stone: Yes.

Mr. Moody: No, I don't want to examine it. It has nothing to do with this case.

Mr. Stone: Q. I show you here, doctor, a number of letters and replies in May, 1913, relating to the business of the office. Will you kindly examine that exhibit for the month of May, 1913, and state whether or not those are the original letters received at the office, and copies of replies given by you in regard to any business of the office or the treatment of any patient?

Mr. Moody: Is this the office at Third and Broadway?

Mr. Stone: That is for the witness to say, where it is. It is immaterial where it was. The conspiracy is alleged to be January 1st, 1912, and from that time on, continuous, Your Honor.

Mr. Moody: During the times mentioned in the indictment.

The Court: Well, this question, Mr. Moody, is

preliminary. Haven't you examined those documents?

A. Yes, sir, *I know them.*

The Court: Well, you can answer the question then.

A. Yes, sir, these are parts of my records.

Q. By Mr. Stone: That is for that month; is that correct?

A. Yes, sir.

Mr. Stone: We offer those in evidence, if Your Honor please.

Mr. Moody: To that we object, on the ground they are incompetent, irrelevant and immaterial. and do not go to prove or disprove any issue in this case, inasmuch as these are from the office of Dr. Freeman, which he has testified he was running alone, separate and apart from the other defendants, separate and apart from the place at which the indictment alleges the conspiracy was formed and carried on, and therefore they are incompetent, irrelevant and immaterial.

Mr. Stone: I want to be heard further on that.

The Court: I will hear from you, Mr. Stone.

Mr. Stone: Now, if Your Honor please, our position is this: That in this case, up to this time, here are men associated in this particular business. They have been charged here with conspiracy, or a scheme or conspiracy to violate a certain provision of the federal code, that is, section 215. That is, a device or scheme to defraud by use of the mails. That has been emphasized by the counsel for the government time and time again,—by the use of the mails. Now, the only thing that appears in evidence up to this time are some decoy letters, that were admittedly false on

their face, admittedly did not state the true facts, that were sent to this office, and to which certain replies had been made. These decoy letters are dated along about September and October, 1912. Now, it is attempted by these decoy letters to show that these men were engaged in a criminal conspiracy in the use of the United States mails. Now, there is no more definite and certain way to tell whether or not a man is engaged in a criminal conspiracy in the use of the mails than by the production of the correspondence which he actually had with his *bona fide* patients or people he was dealing with. In other words, can it be said that the defendants are to be put upon this trial and confronted simply with decoy letters, which are themselves admittedly false, and answers which were sent out under circumstances of this kind, and then they are precluded from showing the entire correspondence over the time, the period in which they say the criminal conspiracy existed. Any business man, in any business in this city, if he was charged with a conspiracy in the use of the mails in his merchandise, or anything else, there is nothing that would show his intention or the conduct of his business more certainly and generally than his actual correspondence with people with whom he was dealing. It is our contention, and I never heard it disputed in this court before, that in a conspiracy charge for the use of the mails, that the letters actually written and sent pertaining to the use of the mails over the times they say the conspiracy existed, should be admitted in evidence. I never have seen the objection made before, and I

have prosecuted numbers of cases in this court, if Your Honor please, and I have never raised the objection, or seen it raised, or heard it questioned that it could not be done, as bearing on the man's intent in the use of the mails.

The Court: Well, Mr. Stone, what difference does it make how many honest letters he wrote, if he wrote one dishonest letter? I don't see how it makes any difference.

Mr. Stone: It makes this difference, if Your Honor please: The inquiry here is whether or not they were engaged in a criminal conspiracy. Can it be stated that they can pick out a few decoy letters that were sent to them, and to which answers have been made, without their knowledge, as the evidence appears here, and then all the letters pertaining to their business, showing they were doing an honest business, can be cut out? That is not the law, Your Honor.

The Court: I don't understand your claim these are the letters of the people alleged in the conspiracy,—the letters of this one witness.

Mr. Stone: No, they have introduced the replies. Now, we offer to show the letters that were actually sent from their office, relating to their business.

The Court: To these particular correspondents?

Mr. Stone: Not to these particular correspondents, Your Honor. It is a very important question in this case, and I will state to Your Honor I am satisfied of my position about it. I may be wrong, but it is either a grave error to refuse the admission of these letters or it is not error at all.

The Court: As I understand you, Mr. Stone, these letters were written by this witness to patients of his?

Mr. Stone: I will correct Your Honor in this, these letters are letters that he received from different people with whom he was dealing, and copies of his replies.

The Court: When he was in the office?

Mr. Stone: Yes, sir.

The Court: Under the employment of Holsman?

Mr. Stone: Well, while he was in the office. His name is signed to them.

The Court: I say, while he was in the employment of Holsman?

Mr. Stone: Yes, sir, while he was in the office, anyway. It does not make any difference whose employment he was in.

The Court: Well, I think it does make a difference in any event.

Mr. Stone: Your Honor, this indictment charges that at the times these letters are dated—we have over 150 letters, which cover the entire correspondence of this office from the time these decoy letters were sent up to the time these postoffice inspectors came to investigate. Now, we are not offering letters after the postoffice inspectors investigated there, because they would say those letters were made for the purpose of avoiding prosecution. But we are offering letters which existed and show the business of the office between the time the decoy letters were sent there and the time they were questioned by government officials, at a time when there was no reason for fabricating matter, but was their correspondence. The indict-

ment charges they conspired to defraud various people by the use of the mails, and we want to show by every man that had correspondence with him that he never intended to defraud him; that the letters we received from those people, and every letter sent to them in every instance stated they must come to the office for examination, in *contravention of the things alleged in the indictment.*

The Court: It seems to me, Mr. Stone, they are self-serving declarations and not admissible.

Mr. Stone: Exception. We want to make the offer for the purpose of the record. Ex. 11.

The Court: Yes, have them marked for identification.

Mr. Stone: Yes. We offer first, if Your Honor please, we might offer them as one exhibit, a series of letters and copies received from patients, people with whom these defendants were dealing in May, 1913, as Defendant's Exhibit No. 1, there being about 30 or 40 letters.

The Court: Are they fastened together?

Mr. Stone: I think so, Your Honor.

The Court: Mark that Exhibit 1.

Mr. Stone: This is No. 1, being the entire correspondence of the office for that month, relating to the treatment of any disease by the use of the mails.

Mr. Moody: While Your Honor has sustained the objection, and while counsel has entered an exception, in order that the records may be clear I will interpose an objection upon another ground, that it is privileged

correspondence, and the privilege is not waived by the addressee or the writer of the letters.

The Court: *That objection is well taken, too, I should think.*

Mr. Stone: I don't think so, under the facts in this case.

The Court: Well, proceed, Mr. Stone.

Mr. Stone: We made no objection to the privilege of the postoffice inspectors."

The defendants identified, by the defendant Freeman, while on the witness stand, their correspondence for several months beginning with May, 1913, the same being office copies of the letters they sent out, and the original replies thereto, for the purpose of showing the nature of the business transacted by the defendants, which was charged to be fraudulent over this period of time. It will be seen that the postoffice inspectors visited the office of the defendants about the first part of the year 1914, and while there inquired of the defendant Freeman about the business; and that the postoffice inspectors testified to these facts on behalf of the prosecution. The correspondence for each month, as above stated, was identified by the defendant Freeman, and offered in evidence, and to each and all of it the court sustained the prosecution's objection. This apparently upon the theory that they would be self-serving declarations. We contend that as to whether or not they were self-serving was a question of fact for the jury, which went to the *weight* of the testimony rather than to its admissibility. The question, therefore, resolves itself into this proposition,

whether or not the defendants, when charged with a scheme to defraud by the use of the mails, and the charge is only supported by certain decoy letters and their purported replies, may not show their real correspondence with people they are actually doing business with by the use of the mails, covering a period of time during which it is charged they were using the mails in a scheme to defraud, and for the purpose of showing their good faith. This correspondence offered in evidence, as identified by the defendant Freeman, was at least *prima facie* what he stated it to be. The replies in many instances bore the official postoffice stamp and date, and showed without doubt that it was *bona fide* correspondence, and there were a large number of letters and replies over the very time that it was charged the defendants were sending out letters to defraud persons, and the same was identified as all the correspondence for these months. It will be noted that the postoffice inspector Webster had obtained certain of the correspondence of the defendants which was *bona fide* between the patients and the defendants, but offered none of it in evidence. It is a case where a conspiracy to defraud by the use of the mails is charged to exist over the very time that the correspondence offered in evidence was had. It is a case where the postoffice inspectors obtained a part of the correspondence of the defendants with their patients and failed to offer any of it in evidence and the defendants thus sought to show their *bona fide* correspondence, and the prosecution objected to the same and relied wholly upon the decoy letters. This was too

narrow a theory upon which to try the case, for what could be more certain evidence of whether or not defendants were attempting to defraud by the use of the mails than the correspondence with their patients. We contend that it was absolutely error to not admit this correspondence in evidence. The cross-examination as to its verity, after its truthfulness was *prima facie* established, would have given the prosecution their full rights in the premises, but because evidence may be weak in its nature, yet if it is relevant to the issue, its weakness is to be distinguished from its admissibility. It should have been admitted on the general principle that where a part of a series of acts in controversy are submitted to the jury, all of the acts relating to the same subject-matter should also go to the jury. This is especially true in a conspiracy charge, for can it be said that the prosecution may (in a conspiracy charge of using the mails to defraud) be permitted to introduce two or three decoy letters relating to defendants' business, and the defense be excluded from showing their *bona fide* correspondence? If any of the correspondence known to the inspectors, other than that offered in evidence by the defendants. tend to show a scheme to defraud, it would have been readily offered in evidence by the government. The principle we are contending for herein is sustained by the case of Sprinkle v. United States, 141 Fed. 811. Vol. 3 Wigmore on Evidence, section 2113. Vol. 1, section 103, Wigmore on Evidence. This principle was enacted into the Code of California by section 1854 of the California Code of Civil Procedure, which in substance

provides: when part of an act, etc., or writing is given in evidence by one party, the whole on the same substance may be inquired into by the other, and that when a detached act, etc., is given in evidence, any other act or declaration or writing which is necessary to make it understood may also be given in evidence. A sample of these letters is set out beginning on page 119 of the Transcript. Many others were offered, approximately one hundred, but only a portion were printed to indicate the kind and character of the correspondence.

No. 3.

The Court Erred in Refusing to Give the Instructions Requested by the Defendants.

The defendants requested eleven instructions, as more fully appears on pages 187-194 of the Transcript, as follows:

"Thereupon the government and the defendant rested the case and the defendants requested the court to instruct the jury as follows:

I.

I instruct you in this case that the gist of the allegations against the defendants is a conspiracy and the doing of an act or acts, to-wit, the mailing of letters set out in the indictment, in furtherance of the conspiracy.

You cannot find the defendants or either of them guilty of a conspiracy in the case, even though you believe such has existed as charged in the indictment, unless you further believe from the evidence, beyond

a reasonable doubt, that the defendants or one of them mailed or caused to be mailed the letters, or one of the letters, set out in the indictment, in furtherance of the alleged conspiracy; because a conspiracy under the United States laws is not a crime, though it is an agreement or understanding to do an unlawful act or acts, unless the overt act or one of them alleged in the indictment is actually committed bythe defendant or one of the defendants after the conspiracy is formed and in furtherance thereof, and hence, unless you believe from the evidence in this case, beyond all reasonable doubt, that the defendants had entered into a conspiracy, as alleged in the indictment, and further, that the defendants, or one of them, in furtherance of said conspiracy, actually mailed, or actually caused to be mailed, the letters, or one of them, set out in the indictment, then it would be your duty to acquit the defendants.

II.

I instruct you that unless you believe from the evidence, beyond a reasonable doubt, that the defendants conspired together as alleged in the indictment, in devising a scheme to defraud, and knowingly used the mails in furtherance thereof, then no statement or act of either defendant should be considered against any other defendant or defendants in determining whether or not there was a conspiracy as charged in the indictment. That is to say, before the act or acts of any defendant can be used or considered against another defendant or defendants it must first appear

beyond a reasonable doubt that the conspiracy existed as alleged in the indictment.

III.

I instruct you that under the law what is known as decoy evidence, such as the sending of the two letters set out in the indictment, by the postoffice inspector, for the purpose of procuring an answer from the defendants, or one of them, may be used for the purpose of apprehending or ascertaining whether a person is engaged in the commission of a criminal offense against the laws of the United States. But in this charge of conspiracy, unless you believe from the evidence, beyond a reasonable doubt, that at the time the said decoy letters or letter was mailed to the defendants or one of the defendants, the said defendants were engaged in the criminal practice charged in the indictment; or unless the defendants had conspired together, as alleged in the indictment at the time of or before the sending said letter or letters by the postoffice inspector, then the evidence of said decoy letters is not alone sufficient upon which to base the verdict of guilty, because a government official cannot conspire with another person to violate the laws of the United States, and it is against public policy for a government official to suggest or originate a conspiracy or any other crime, and hence, if you believe from the evidence in this case that a conspiracy, as alleged, was suggested and planned by the postoffice inspector, or inspectors, and the defendants were not actually in said conspiracy as alleged, except as shown by a re-

sponse to the letters of said postoffice inspector, then it will be your duty to acquit the defendants.

IV.

I instruct you that it is against the policy of the laws of the United States to sustain a prosecution or conviction upon an indictment charging a conspiracy against the laws of the United States if the conspiracy or plan originated solely in the mind or minds of the government officials, and hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendants at the time alleged in the indictment had formed a conspiracy as therein alleged, without the suggestion and origination of the same by the postoffice inspector, or inspectors, and independent thereof, then it will be your duty to acquit the defendants.

V.

I instruct you that while it may be proper under the laws of the United States for a government officer to use decoy methods in apprehending crime, that is, to ascertain whether or not a person or persons are actually engaged in an offense against the laws of the United States, nevertheless, the evidence, if any, or the facts or circumstances, if any, procured by said decoy method, can only be considered by you in determining the question as to whether or not the defendants had actually entered into the conspiracy as charged in the indictment, and any fact, or facts, or circumstances acquired by said decoy letters are not of themselves sufficient to sustain a verdict of guilty unless you believe from the evidence beyond a reason-

able doubt that the defendants had, independent of said decoy letters, entered into the conspiracy at the time and place as alleged in the indictment.

VI.

I instruct you that unless you believe from the evidence beyond a reasonable doubt in this case, that the defendants or one of them actually mailed or actually caused to be mailed the letters, or one of them, set out in the indictment, then it will be your duty to acquit the defendants, because unless the defendants, or one of them, knew of, or in some way authorized the mailing of the letter, or letters, set out in the indictment, then the defendants would not be guilty, regardless of whether or not you may believe there was, or was not, a conspiracy between them.

VII.

I instruct you that a person cannot, as the agent or employee of another in any business, bind his employer in a criminal proceeding or charge, and his employer is not responsible for the acts of the employee in committing a criminal offense, unless you believe from the evidence, beyond a reasonable doubt, that the employer in some way knew of the act or acts of the employee, alleged to be criminal, or in some way authorized the acts of the employee; and hence, unless you believe from the evidence, beyond a reasonable doubt, that the defendants in some way knew of, or intentionally authorized the mailing of the letter or letters set out in the indictment, then it will be your duty to acquit the defendants.

VIII.

I instruct you that before you can find a verdict of guilty against the defendants in this case that you must find that all of the following conditions exist:

(a) That there was a conspiracy between them, as alleged in the indictment.

(b) That the object of that conspiracy was that the said defendants should devise a scheme or plan to defraud the persons, as alleged in the indictment, and

(c) That said defendants intended the use of the United States mails in carrying out or in the furthering of the object of such conspiracy.

And it is necessary, before you are authorized to find a verdict of guilty in this case, that you believe all of the above elements to exist in this case. It is not sufficient that one of them exist, but they all must have existed, as alleged in the indictment, and to your satisfaction, beyond a reasonable doubt, before you are authorized to convict the defendants.

IX.

I instruct you that the principal or master is not criminally liable for the acts of his agent or servant even though done in the general course of his employment, unless such acts of the agent or servant are authorized or consented to by the principal or master, and that no authority to do a criminal act will be presumed. Hence, unless you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, Holsman, actually mailed the letter or letters set out in the indictment, or caused the same to be mailed, or in some way knowingly authorized or acquiesced

in the mailing thereof in furtherance of the scheme as charged in the indictment, then it will be your duty to acquit him, even though you may believe from the evidence that the defendant Sims was employed by the defendants to care for the correspondence and answering letters, even though you believe that the answering of letters by the defendant Sims was in the course of his employment.

X.

I instruct you that under this charge of conspiracy, before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt that they had an understanding or agreement between or among themselves to defraud any and all persons who could be induced to write to them as charged in the indictment. And further, as a part of said conspiracy, they intended the use of the mails in furtherance of said conspiracy.

The first question for you to consider is, was there a conspiracy? That is to say, did the defendants conspire or agree together and between or among themselves to commit the offense against the United States, as charged in the indictment? And, in the next place, did they enter into an agreement or plan by which it was agreed or understood between or among themselves that they would defraud any and all persons, as charged in the indictment? And, in the next place, did they knowingly or intentionally mail, or cause to be mailed, either of the letters charged in the indictment?

Before you are authorized to convict the defendants, or either of them, you must believe beyond a reasonable doubt that they intended to defraud in the manner and by the use of the means set out in the indictment.

If the defendants, acting as specialists in the treatment of diseases, acted in good faith and honestly believed in the representations which they made, if any, and did not by any of their said acts, as charged in the indictment, intend to defraud any person or persons, then it is your duty to acquit the defendants.

XI.

I instruct you that though you may believe from the evidence that the defendant Holsman was financially interested in the office conducted at Los Angeles at the time alleged in the indictment, yet unless you believe from the evidence, beyond a reasonable doubt, that he knew of or consented to or in some way authorized the mailing of the letters, or one of them, set out in the indictment, then you cannot convict him, and it will be your duty to find a verdict of not guilty as to him.

To the refusal to give the foregoing instructions and each of them the defendants and each of them duly excepted. Ex. 20-30, inclusive."

Under this assignment we call attention to the refusal of the court to give the eleven requested instructions.

It will be noticed that the first requested instruction was to the effect that the defendant should be acquitted unless the jury believed beyond a reasonable

doubt that they or one of them mailed, or caused to be mailed, the letters, or one of the letters, set out in the indictment. There was absolutely no proof that the defendant Holsman ever knew anything about the mailing of the letters. He was not in the office at any time any of the decoy letters were mailed, and the defendant Freeman positively testified that he did not mail, or cause to be mailed, or know anything about the mailing of the replies to the decoy letters. We for this reason respectfully submit that defendants' requested instruction No. 1 on this point should have been given.

In the next place requested instruction No. 2 was to the effect that before the act, or acts, of any of the defendants could be considered or used against another defendant, or defendants, it must first appear beyond a reasonable doubt the conspiracy existed as alleged in the indictment. It was, therefore, certainly a very serious error not to give this instruction in view of government's Exhibit A-1 admitted in evidence over defendants' objection, and which we have discussed under subdivision (b) of No. 2, *supra.*

In the next place defendants' requested instructions Nos. 3, 4 and 5, pages 189-191 of the Transcript, are squarely the law within the meaning of the following cases:

Woo Wai v. United States, 223 Fed. 412;
Sam Yick *et al.* v. United States, 240 Fed. 60.

These instructions should have been given because all the evidence submitted to the jury as tending to prove the fraud on the part of the defendants shows

that the postoffice inspectors suggested the writing of the replies to the decoy letters, and wholly brought about the replies upon which the prosecution alone rested to sustain its conviction. It will be noted later that when the court on its own motion instructed the jury, that he gave a part of requested instructions Nos. 3, 4 and 5, and in the same instruction, given of his own motion, gave another that contradicted the one given. Refusal to give requested instructions Nos. 3, 4 and 5 under the evidence was clearly error under the two cases above cited.

In the next place defendants' requested instruction No. 5, on page 190 of the Transcript, to the effect that the decoy evidence could only be considered by the jury to determine whether or not the defendants had acually entered into the conspiracy, and were not of themselves sufficient to sustain a verdict of guilty unless the jury believed, independent of said decoy letters, that they had entered into the conspiracy, should have been given underthe authority of the two cases cited above, which clearly hold that the evidence of the instigators of the crime is not sufficient. In the case at bar, of course, it will not be contended, and cannot be contended, that there was any evidence against the defendants to support the charge, except the decoy letters.

In the next place defendants' instruction No. 7 should have been given on behalf of the defendant Holsman for the reason that all the evidence in the case shows that while Holsman owned the office, or was an owner with other persons, the defendant Free-

man was working on a salary and commission, in charge of the office, and that Holsman had given express instructions not to send out such literature as is charged in the indictment, and was not in the office at the time the answers to the decoy letters were sent out, and therefore he was in the identical position of an employer, and if the replies were made by the defendant Simms, and against the instructions of the defendant Holsman, the instructions should have been given, for it is elementary law that the agent or an employee of a person in business cannot bind his employer in a criminal proceeding, and his employer is not responsible for his acts in committing a criminal offense unless the employer in some way knew of the act or acts of the employee, or in some way authorized the act. The evidence clearly shows the facts above stated. Then, why was it not just and fair that the instruction be given on behalf of the defendant Holsman? It let the case go to the jury in such a way that they must of necessity infer, because defendant Holsman was the owner of the business, that he was criminally responsible for an act committed in his absence, and which he did not authorize. Also the same theory was embodied in defendants' requested instruction 9, on page 192 of the Transcript, in different language, but this was refused by the court. Defendants' requested instructions No. 7 and 9 were especially applicable to the evidence in the case, and in no part of the court's instructions was the principle embodied as contended for in these instructions.

Again, defendants' requested instruction No. 11,

page 194 of the Transcript, to the effect that unless the jury believed that the defendant Holsman knew about, or consented to, or in some way authorized the mailing of the letters, or one of them, set out in the indictment, then he could not be convicted, should have been given for the reason that the uncontradicted evidence shows that he was not only absent from the office at the time the decoy replies were mailed, but had theretofore given express instructions not to send out such letters through the mail.

No. 4.

The Court Erred in Instructing the Jury.

The court erred in instructing the jury of its own motion as shown on pages 200, 201 and 202, the same being the court's instruction of his own motion numbered 12 and 13, for the following reasons:

First, the instructions are inconsistent, contradictory and misleading

Second, there were upon the weight of the evidence and which instructions are as follows:

"XII.

"It is lawful that what is known as decoy letters, such as the letters sent by the postoffice inspector in this case for the purpose of procuring an answer from the defendants, or one of them, may be used for the purpose of ascertaining whether the person addressed is engaged in the commission of a criminal offense against the laws of the United States. If at the time the said decoy letter or letters were mailed to the defendants, the said defendants were engaged in the

criminal practice charged in the indictment, and the said defendants in response to said alleged decoy letters, mailed one or both of the letters set forth in the indictment in answer to such decoy letters, or either of them, in order to execute or carry out such conspiracy, or in an attempt so to do, then the use of such decoy letters and the answers thereto can lawfully be received as evidence to prove said conspiracy.

A government official cannot conspire with another person to violate the laws of the United States for the purpose of getting such person convicted of a crime. The conspiracy with which the defendants are charged must be proven to exist *independently* of any inducement to enter therein by any government official. In other words, if the conspiracy existed, *it does not matter what the government officers did in order to procure evidence to prove it.*"

"XIII.

"It is admitted by the government in this case that each of the letters set out in the indictment and alleged therein to be the overt acts pursuant to the accomplishment of the purpose of the conspiracy alleged in the indictment, were received by the addresses therein respectively in reply to letters respectively addressed to the defendant G. M. Freeman, M. D., either by a United States postal inspector or by another procured by the inspector so to do, and that the letters addressed to said defendant were addressed to him for the purpose of giving to the government information as to whether or not the defendants charged in the indictment were engaged in an unlawful use of the

mails. These letters so addressed to said defendants may be properly designated as decoy letters. You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is *no defense* in this action. You are further instructed that a government officer suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by so responding violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official."

It will be noted that the court in the last part of instruction 12 instructed the jury that the "conspiracy with which the defendants are charged must be proven to exist *independently* of any inducement to enter therein by any government official." Also in the same instruction that "In other words, if the conspiracy existed, it *does not matter what the government officers did* in order to procure evidence to prove it." Again, in instruction 13 the court instructed the jury as follows: "You are instructed that the fact that the letters alleged in the indictment were in reply to such decoy letters is *no defense* in this action." Now

let us analyze these statements taken together. The analysis amounts to this: First, that the jury are told that the conspiracy must be proven *independently* of any inducement to enter into it by the government official, and in the next place that the fact that the letters were decoy letters is *no defense* in this case, when as a matter of fact they *may* or *may not* have been a defense, depending upon whether or not the jury believed the conspiracy existed independently of the letters, and for this reason, also, the charge was upon the weight of the evidence. In other words, the court had plainly told the jury that the conspiracy must be proven *independently* of any inducement to enter therein by the government officials, and then with full knowledge that the decoy letters were the only evidence in the case relied on by the government, the court instructed the jury that the fact that they were decoy letters was *no defense,* thereby making the instruction misleading, contradictory and confusing.

In the next place the latter part of instruction No. 13 is not only confusing, misleading and contradictory of the other portions of instructions 12 and 13, but is squarely not the law within the meaning of the decisions in the case of United States v. Woo Wai and United States v. Sam Yick *et al., supra.* It will be noted that that part of the instruction reads as follows:

"You are further instructed that a government officer suspecting that a person or persons may be engaged in a business in violation of the laws of the United States, has a right to seek information under

an assumed name, directly from such person or persons so suspected. That if such suspected person or persons respond to such inquiry for such information, and by *so responding* violates a law of the United States by using the mails to convey such information, which use of the mails is prohibited by law, then such person or persons so using the mails cannot, when indicted for that offense, set up that he would not have violated the law if the inquiry had not been made of him by the government official or through the procurement of the government official."

The fault of this portion of the instruction particularly is that it first tells the jury that the government official may use the decoy letter for the purpose of finding out whether a person is engaged in a conspiracy when the jury had already been instructed that the decoy letters of themselves were not sufficient to convict, and then this latter part of instruction No. 13 tells the jury that if by *so responding* violates a law of the United States, etc., when indicted for that offense he cannot set up that he would not have committed the offense if the government official had not induced him to do so.

What was no doubt intended was to instruct the jury that while the decoy letters and answers, if wholly induced by the government officials, was not sufficient to sustain the conviction, yet it was legitimate to use them to find out whether or not defendants were engaged in a criminal conspiracy, but the instruction reads that "if the person by *so responding* violates the law." It is not a question of whether or not the *re-*

sponse to the decoy letter violates the law, but whether or not there *is a criminal conspiracy.*

So it will be seen by casual examination of instructions 12 and 13, given by the court of his own motion, that it is impossible to reconcile the plain inconsistent, contradictory statements in regard to the law of decoy letters. It is very plain, and too plain to admit of doubt, that the court instructed the jury in the first place that the decoy letters were not sufficient to convict, that there *must be independent evidence* of the criminal conspiracy, and immediately following this instructed the jury that the fact that the letters were *decoy letters was no defense*, so that the decoy letters being all the evidence in the case relied upon by the government, it is impossible to tell whether the jury believed that the evidence adduced by the decoy letters showed a criminal conspiracy, or whether or not they followed the court's instruction to the effect that the fact that the letters were decoy was *no defense.* In other words it seems very evident that the court, in view of the decisions of the Supreme Court of the United States holding that decoy evidence was sufficient to sustain a conviction against a mail carrier for opening mail, and in view of the two recent decisions of this Honorable Court hereinbefore quoted, attempted to extract from these various decisions, which are not at all inconsistent, but are entirely harmonious, a new statement of the law which is not only in violation of the decisions of the Supreme Court of the United States in the decoy letter cases, but is not supported by the decisions of this Honorable Court,

and which two instructions when carefully read, and again carefully read, lead the more to bewilderment and uncertainty as to just what was meant by the court. It is not a clear, concise statement of the law, and lacks in every element of certainty and consistency.

These defendants were entitled to a clear statement of the law to the jury. It is therefore most respectfully submitted that the Honorable District Judge who tried this case erred in the submission and rejection of evidence and in refusing the defendants' requested instructions, and in the giving of instructions 12 and 13 of his own motion, and that this cause should be reversed and remanded, and a new trial ordered in favor of these defendants.

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